

## Jefferson County Industrial Development Agency (JCIDA)

### Policy for Termination and/or Modification of Agency Financial Assistance

And

### Recapture of Agency Financial Assistance Previously Granted

Adopted: June 2, 2016

Amended and Restated: January 3, 2019

Reviewed October 1, 2020

1. Purpose. To establish and provide a fair procedure, compliant with Sections 874 and 875 of the New York General Municipal Law and **JCIDA** policies, potentially resulting in the termination and/or modification of Agency Financial Assistance and/or the recapture of all or a portion of Agency Financial Assistance.
2. Goal. The goal of this policy is to enact a procedure for implementing the potential or actual termination and/or modification of Agency Financial Assistance and/or recapture of all or a portion of Agency Financial Assistance from Applicants resulting from the violation of certain statutory requirements and/or Material Factors, as defined herein, that were relied upon and established as consideration for the granting of Financial Assistance to Applicants.
3. Definitions.
  - a. Agency Financial Assistance includes any or all: (i) exemptions from New York State and local sales and use tax; (ii) an exemption from mortgage recording tax; and/or (iii) an abatement from real property tax provided by or through the **JCIDA** (under the terms of a Payment-in-lieu-of-Taxes Agreement or "PILOT Agreement") to an Applicant in order to induce such Applicant to undertake a project (also referred to herein individually or collectively as "Financial Assistance").
  - b. Applicant is a for-profit or not-for-profit entity that has applied for and received Agency Financial Assistance from **JCIDA**.
  - c. Material Factors are factors, and any related reporting requirements established to verify such factors, determined by the **JCIDA** Board as being so significant that without such factors at the level specified, it is unlikely that the JCIDA would have agreed to grant Agency Financial Assistance. Such Agency Financial Assistance was provided based upon evaluation of the Applicant's ability to meet or exceed Material Factors pursuant to the Agency's Uniform Tax Exempt Policy. The quantity of such Material Factors (said Material Factors typically determined at the time a Project is granted **JCIDA** Financial Assistance) and the threshold for

the termination and/or modification of Agency Financial Assistance and for the recapture of Agency Financial Assistance shall be determined by the **JCIDA** Board or **JCIDA** staff, as appropriate (and as further identified, below), on a case by case basis.

- d. Recapture of Agency Financial Assistance is the result of an action taken by the **JCIDA** Board to seek to have an Applicant return all or a portion of Agency Financial Assistance that it has received.
- e. Termination of Agency Financial Assistance is the result of an action taken by the **JCIDA** Board or **JCIDA** staff, as appropriate, to cause an Applicant to cease receiving Agency Financial Assistance that it otherwise would have obtained in the future,
- f. Modification of Agency Financial Assistance is the result of an action taken by the **JCIDA** Board to cause a modification of the amount of Agency Financial Assistance to be received by the Applicant, for example, a modification of the abatement/increased payments under a PILOT Agreement, in the future.

4. Termination and/or Modification of Agency Financial Assistance and/or Recapture of Agency Financial Assistance.

- a. Future Agency Financial Assistance may be terminated and/or modified by the **JCIDA** Board for a violation of any Material Factor contained in the **JCIDA** Application for Financial Assistance, inducement resolution (including all submissions made by the Applicant), Agent Agreement, Project Agreement, Lease/Leaseback Agreement, PILOT Agreement or any other agreement by and between the Applicant and the **JCIDA** (collectively, "**JCIDA** Transaction Documents").
- b. In addition to the termination and/or modification of Agency Financial Assistance, the **JCIDA** may impose recapture of Agency Financial Assistance where it is determined through the process specified below, that:
  - i. Agency Financial Assistance was obtained as a result of a knowing, misstatement of a material fact where such misstatement occurred in the written **JCIDA** Application for Financial Assistance, in any written submission, or in any on the record verbal statement made to **JCIDA** staff, the **JCIDA** Board or any **JCIDA** Committee;
  - ii. An applicant failed to achieve the goals identified as Material Factors by the **JCIDA** Board at the time that the inducement/granting of Financial Assistance was approved. Such recapture of Agency Financial Assistance, to the extent provided by law, may consider extenuating and mitigating circumstances and may consider the extent to which the Applicant failed to achieve and maintain the Material Factors.

5. Procedure to Terminate and/or Modify Agency Financial Assistance or to Recapture Agency Financial Assistance.
  - a. Knowledge of Potential Termination/Modification of Financial Assistance or Recapture Issue: When **JCIDA** staff becomes aware of a potential issue with respect to a Material Factor(s) related to the provision of Financial Assistance to an Applicant and is unable to otherwise remedy the issue, **JCIDA** staff shall notify the President/Chief Executive Officer or Chief Operating Officer of the **JCIDA** (note in the case where **JCIDA** staff is able to remedy said issue, **JCIDA** staff shall still notify the President/Chief Executive Officer or Chief Operating Officer of the **JCIDA**). The **JCIDA** staff shall also notify or cause to be notified, the Chair of the **JCIDA** and such other individuals as the **JCIDA** Board may determine. It is understood that this **JCIDA** Due Process Policy shall not apply to termination of Agency Financial Assistance related to the typical/standard events of default (not otherwise involving a Material Factor) as so identified within **JCIDA** Transaction Documents.
  - b. Decision to Commence a Proceeding: Upon notification by staff pursuant to subsection (b) the Chair of the **JCIDA** shall cause a proceeding to be commenced to determine if Agency Financial Assistance should be terminated and/or modified and/or recaptured.
  - c. Notice to the Applicant: Once a decision is made to commence a proceeding to terminate and/or modify Agency Financial Assistance (said termination/modification of Agency Financial Assistance being related to a Material Factor and otherwise unrelated to typical/standard events of default as so identified within **JCIDA** Transaction Documents) and/or to recapture Agency Financial Assistance, the Applicant shall be provided written notice ("Notice") of: (i) the alleged Material Factor(s) violation, (ii) the potential for termination and/or modification of Agency Financial Assistance and/or for recapture of Agency Financial Assistance as may be considered with respect to the commencement of such a proceeding, (iii) their rights to be heard and to appeal any such determination, and (iv) the date and time where a meeting of the Executive Committee will take place to consider the matter.
  - d. Sufficient Time to Prepare a Response and Opportunity to be Heard: An Applicant shall be given ten (10) business days from the date said Notice, as described in Section 5(c), above, is received or deemed received to prepare and submit a written response to any alleged Material Factor(s) violation. The ten (10) business day response period, as described above, can be extended for good cause shown, as determined by the Chair. Thereafter, an Applicant will be provided an opportunity to make a written or written and oral presentation to the **JCIDA** Executive Committee.
  - e. Representation: An Applicant shall have the right to be represented by counsel, or to appear without counsel.

- f. Creation of Written Record: The **JCIDA** Executive Committee shall take written meeting minutes that include a statement/summary of: (i) the alleged Material Factor(s) violation, (ii) the response, (iii) all evidence that has been submitted, and (iv) a summary of any oral presentations that have been made. The meeting minutes shall also include the vote, if any, taken by the **JCIDA** Executive Committee.
  
- g. Executive Session: To the extent allowed by the New York State Open Meetings Law, at the request of an Applicant, the **JCIDA** Executive Committee may go into executive session to receive certain confidential information that pertains to the considerations being made by the **JCIDA** Executive Committee.
  
- h. JCIDA Executive Committee Recommendation: The **JCIDA** Executive Committee shall vote on a resolution recommending a termination and/or a modification of Agency Financial Assistance and/or a recapture of Agency Financial Assistance, or no action. The resolution shall contain a statement of the reasons for the recommendation and shall be passed by a majority vote of the entire Executive Committee. The Committee recommendation shall be presented to the full **JCIDA** Board for a final determination. No recommendation to terminate and/or modify agency financial assistance and/or to recapture agency financial assistance will become effective until and unless it is adopted by a majority vote of the entire **JCIDA** Board. The **JCIDA** Board may reject recommendation, modify a recommendation or approval recommendation in whole or in part.
  - i. If a determination is made to recapture an abated amount of real property tax payment or payments provided by and through the **JCIDA** to an Applicant under the terms of a PILOT Agreement, the maximum amount that may be recaptured is equal to, but may be less than, the sum total of real property tax abatement received by the Applicant in the year or years that the violation(s) of Material Factors occurred as so determined by the **JCIDA** Board in consultation with **JCIDA** staff and as provided in the related inducement resolution authorizing the provision of Financial Assistance to the Applicant. If the **JCIDA** Board determines that an Applicant be subject to a real property tax abatement recapture event with respect to a particular year or year(s), it need not also simultaneously determine, although it may do so, termination of real property tax abatements going forward.
  
  - ii. If a determination is made to modify Agency Financial Assistance, the **JCIDA** Board, in consultation with **JCIDA** staff, may modify the amount of Financial Assistance, for example, to require a modification of any PILOT Agreement to require increased payments.
  
- i. Appeal to JCIDA Board: An Applicant shall have the right to submit a written appeal to the **JCIDA** Board prior to the date upon which the **JCIDA** Board would otherwise consider taking action on a recommendation from the **JCIDA** Executive

Committee. In addition, the Chair of the **JCIDA** Board may, in his or her discretion, grant an Applicant an opportunity to address the **JCIDA** Board prior to its action on a recommendation from the **JCIDA** Executive Committee.

- j. Flexible Application of Termination and/or Modification of Agency Financial Assistance and Recapture of Agency Financial Assistance: To the extent permitted by law and **JCIDA** policies, the **JCIDA** Board shall have broad discretion in determining how to implement the termination and/or modification of Agency Financial Assistance and the recapture of Agency Financial Assistance. Such determination related thereto shall be based upon the circumstances that trigger such action. The **JCIDA** Board shall consider the extent of the violation of a Material Factor, the duration of such violation, the cause of such violation and the extent to which there was a creation of net new jobs and new investment and adherence to such other Material Factors as may have been considered at the time of the inducement.
6. Other Remedies Available to JCIDA. Notwithstanding the foregoing, the **JCIDA**, acting through its staff, retains the right to terminate Agency Financial Assistance as otherwise provided within the **JCIDA** Transaction Documents (for non-Material Factor(s) issues). Cause for such termination of Agency Financial Assistance include, but are not limited to, failure of the Applicant to make PILOT payments on a timely basis, failure to make reports as required by the **JCIDA** Transaction Documents, or other uncured breaches of the **JCIDA** Transaction Documents.
7. Distribution of Recaptured Financial Assistance. Any and all such returned/recaptured amounts of Agency Financial Assistance shall be redistributed to the appropriate affected tax jurisdiction, unless agreed to otherwise by any local taxing jurisdiction.
8. Recapture of State and Local Sales and Compensating Use Taxes. The **JCIDA** shall keep and maintain records of the amount of state and local sales and use tax exemption benefits provided to each project. The **JCIDA** shall, within 30 days of providing financial assistance to a project that includes any amount of state sales and use tax exemption benefits, report to the Commissioner of Taxation and Finance the amount of such benefits for each project. The **JCIDA** shall recover, recapture, receive, or otherwise obtain from an Applicant, agent, or project operator state sales and use exemption benefits taken which are in excess of the amounts authorized or which are for property or services not authorized or taken in cases where the applicant failed to comply with a material term or condition to use property or services in the manner required by the Agency agreement.

If **JCIDA** recovers, recaptures, receives, or otherwise obtains any amount of state sales and use tax exemption benefits from an Applicant, agent, project operator or other person or entity, the **JCIDA** shall, within 30 days of coming into possession of such amount, remit such amount to the Commissioner of Taxation and Finance, together with such information that the Commissioner may deem necessary to administer payment for such amount. Upon the failure of an Applicant, agent, project operator or other person or entity to remit payment for any amounts of state sales and use tax exemption benefits upon demand by

the **JCIDA**, the **JCIDA** shall join the New York State Commissioner of Taxation and Finance as a party in any action or proceeding that the **JCIDA** commences to recover, recapture, obtain or otherwise seek the return of state sales and use tax exemption benefits from an Applicant, agent, project operator or other person or entity.

The **JCIDA** shall prepare an annual compliance report detailing its activities and efforts to recover, recapture, receive or otherwise obtain state sales and use tax exemption benefits in excess of the amounts authorized or for property or services not authorized or taken, and shall file said report with the Commissioner of Taxation and finance, the Director of the Division of the Budget, the Commissioner of Economic Development, the State Comptroller, and the Jefferson County Board of Legislators.